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Because the computer speaks English? Language rights and digital media

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Legal measures in support of minority language media often take for granted particular models of broadcasting, but are these models valid? How flexible are key instruments such as the European Charter for Regional or Minority Languages? After assessing the applicability of existing law on minority languages to various media platforms and services, it is argued that combining approaches from cyberlaw with sociolinguistic themes of the linguistic landscape and functional completeness can provide a more elaborate account of minority language rights and policy in the context of technological development.

1. Introduction

This is an investigation of the relevance and impact of linguistic rights and language policy in the context of changes in media and communications. The context is that current activities designed to protect and promote language rights and to pursue policy goals typically include the regulation of the media. The inclusion of media regulation within language policy is in recognition of the important role of the media in the construction of culture and identity, and the impact of the media on the survival of threatened languages.

Examples of current interventions include public service obligations and licence requirements. More specifically, broadcasters can be required to dedicate time for minority language programmes, take language into account when choosing songs, or to commission content from independent procedures. These examples are typical because they are directed at television and radio broadcasting, reflecting (or as reflected in) international treaties and standards.

However, the broadcasting sector is itself undergoing substantial change. New methods of distribution, especially on-demand services, have undermined the conventional role of the schedule and encourage a shift away from channels towards 'content' and individual programmes. Furthermore, the adoption of mobile and online technologies enables users to create content and distribute it through social networking services and video sharing sites. So asking whether the conventional tools of support for minority languages remain fit for purpose in the face of such changes is a reasonable question, and the basis for this article. The objective is consider, in light of the cultural and economic changes underway in the broadcast

¹ Based on a paper presented in the Soillse seminar series at the School of Scottish and Celtic Studies, University of Edinburgh (and greatly influenced by the very thoughtful comments received there). Thanks also to Dr. Rachael Craufurd Smith (Edinburgh Law School) for a helpful discussion of early ideas, and Dr. Stephanie Berry (Sussex) for comments on a draft. The title adapts a phrase attributed to Askar Akayev, former President of Kyrgyzstan, in a speech by former US vice-president Al Gore, discussed in Jack Goldsmith and Tim Wu, *Who controls the Internet? Illusions of a borderless world* (OUP 2006) 50.

sector in response to technological development, the types of interventions in support of minority languages that remain appropriate.

In part 2, the relevant legal provisions are outlined, and set alongside an account of developments in the media industries. In the following section (part 3), the applicability of the provisions to the industries is explored in more detail, with a focus on quotas under EU law and commitments under the European Charter for Regional or Minority Languages. These explorations are the basis for a discussion in part 4, where it is argued that combining current approaches in the field of cyberlaw with sociolinguistic themes of functional completeness and the 'linguistic landscape' offer an opportunity for a more nuanced analysis of language rights in the context of digital media.

2.1 Legal context

Aspects of language policy, including the particular case of media, are developed and sustained through law. The right to 'receive and impart information' in article 10 of the European Convention on Human Rights (ECHR) is relevant, as are comparable provisions in domestic constitutions. The European Union has a requirement to take culture into account included in its Treaties. Its Charter of Fundamental Rights contains provisions in similar terms to article 10 ECHR on expression and information, but also a commitment, in article 22, to cultural and linguistic diversity – all applicable only in areas of EU competence.² Harmonising laws cannot be adopted on the basis of the provision on culture alone,³ although the EU has adopted a number of Directives in the field of media, on the basis of harmonization of laws in the internal market (freedom to provide services).

The Council of Europe has also adopted a specific instrument in respect of language. The 1992 European Charter for Regional or Minority Languages (ECRML) has been ratified by 25 states.⁴ The UK ratified it in 2001⁵. The ECRML operates in two ways. Part II applies generally to regional or minority languages within a State. Under part III, States make specific commitments in respect of one or more such languages, in fields such as education, public services and the media. For instance, in the case of the UK, part III commitments have been made in respect of Welsh, Gaelic and Irish, but part II applies to Scots, Ulster Scots, Cornish and Manx Gaelic (as well as the three aforementioned languages).

However, even a combination of these provisions and instruments arguably fails to provide a comprehensive legal agenda for minority languages. Some therefore call

² See Rachael Craufurd Smith 'Article 22: cultural, religious and linguistic diversity' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (Hart 2014) 605-631; Case C-202/11 *Las*.

³ Article 167 TFEU.

⁴ See generally R Gwynedd Parry, 'History, human rights and multilingual citizenship: conceptualizing the European Charter for Regional or Minority Languages' (2010) 61 *Northern Ireland Legal Quarterly* 329-248; Robert Dunbar, 'Minority language rights in international law' (2001) 50 *International & Comparative Law Quarterly* 90-120.

⁵ See further Janet Muller, *Language and conflict in Northern Ireland and Canada: a silent war* (Palgrave Macmillan 2010) 77-98; Robert Dunbar, 'Gaelic in Scotland: the legal and institutional framework' in Wilson McLeod (ed.), *Revitalising Gaelic in Scotland* (Dunedin Academic Press 2006).

for the consideration of 'linguistic human rights', or a combination of human rights with language rights, with a focus on the satisfaction of basic needs such as education.⁶ However, this approach has limited links with what is considered positive law, and may be more appropriately treated as an area of dispute,⁷ with current debates including the degree to which a 'restrained' approach is appropriate⁸ and the need for 'public' multilingualism.⁹ Such debates mean that the confusing status of language in international human rights law (e.g. as an individual right, or a right belonging to 'a language' or a given community of speakers) is the subject of ongoing speculation and scholarship. There are related debates on the relationship between the Internet and human rights¹⁰ and on access to knowledge, both of which are important to language policy. These debates demonstrate the depth of links between expression, education and culture – all of which are covered (to varying degrees) in international human rights instruments.

2.2 Media law context

The development of media industries in minority languages is symbolically important, not least as a practical means of exercising the rights guaranteed by Article 10 ECHR and other instruments. Minority language media supports employment and job opportunities - indeed, the presence of media industries and associated job opportunities is argued to support the acquisition or maintenance of the language by younger people, because they can do so while still pursuing a career of choice.¹¹ More widely, media can be one of the factors influencing the use of a language outside of formal education; even where a minority language is the language of instruction, 'social' use by or between young people is significant in language maintenance.¹² And of course, many existing minority language media services provide programmes specifically targeted at children and teenagers.

As such, the fact that legal provisions applicable to language and the media are not yet well understood is a cause for concern. This phenomenon can be demonstrated by referring to two Council of Europe instruments. Article 11 of the above-mentioned ECRML sets out commitments on support for non-dominant languages in newspapers, radio, television and audiovisual media. However, a good deal of interpretation has been necessary, especially in the context of changing media

⁶ Tove Skutnabb-Kangas, 'Language planning and language rights' in Marlis Hellinger & Anne Pauwels (eds), *Handbook of Language and Communication: Diversity and Change* (2008) 347.

⁷ Xavier Arzoz, 'Language rights as legal norms' (2009) 15 *European Public Law* 541- 574.

⁸ Meital Pinto, 'Taking language rights seriously' (2014) 25 *King's Law Journal* 231-254.

⁹ Stephen May, 'Contesting public monolingualism and diglossia: rethinking political theory and language policy for a multilingual world' (2014) 13 *Language Policy* 371-393.

¹⁰ 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (A/HRC/17/27) http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf; Nicola Lucchi, 'Freedom of expression and the right of access to the Internet' in Monroe Price and others (eds), *Routledge handbook of media law* (Routledge 2013) 164-7.

¹¹ Mike Cormack, 'The media and language maintenance' in Mike Cormack & Niamh Hourigan (eds), *Minority language media: concepts, critiques and case studies* (Multilingual Matters 2007) 55.

¹² Pádraig Ó Riagáin, Glyn Williams, & F Xavier Moreno, *Young people and minority languages: language use outside the classroom* (Centre for Language and Communication Studies 2008).

practices. Issues requiring clarification include how to classify media not mentioned in article 11 (other provisions may be applicable, e.g. article 12 on culture),¹³ the limited impact of article 13 (economic and social life) because of the role of the private sector (particularly relevant regarding technology),¹⁴ and the overall impact of changes in distribution on existing measures.¹⁵

The Framework Convention on National Minorities (FCNM) is not specifically an instrument on language,¹⁶ but because national minorities are often also linguistic minorities, its obligations have a demonstrable impact on language rights, including in the context of media. Article 9 of the FCNM sets out obligations on states to ensure access to the media by national minorities and the possibility of 'creating and using their own media' in radio and television systems. However, both the nature of access¹⁷ (whether it is merely passive or in fact active), and the application of the radio/television provisions to new media¹⁸ (print is provided for in an earlier clause) require elaboration. As with the ECRML, interpretation has been useful but arguably insufficient. As Moring and McGonagle have observed, regarding both instruments, it is the more detailed obligations that lead to consistent and comparable enforcement across signatory states.¹⁹

There is a fair critique of work on language policy, where it is argued that many have fetishised the role of the media, including in a way that excludes the importance of personal, domestic and communal interactions.²⁰ Yet as O'Connell hints, the separation of the media from the lived experience of the speaker (i.e. the idea that engaging with the media can be distinguished from personal life) reflects a particular version of the media that may need to be revisited,²¹ because of the way in which new media is woven into daily personal and community life. As such, attention to digital media and minority languages can work between these gaps and take a holistic approach to linguistic rights. So, today's discussions of minority language media can have a more direct impact on the wider concept of minority language

¹³ Robert Dunbar & Thomas Moring, *The European Charter for Regional or Minority Languages and the media* (Council of Europe 2008) 10.

¹⁴ Ibid 19

¹⁵ Ibid 18.

¹⁶ Indeed, Parry distinguishes between the ECRML and FCNM on the grounds that only the former promotes equality (instead of actions only where necessary): n 4 at 333.

¹⁷ Irini Katsirea, 'Cultural diversity in broadcasting' in David Goldberg and others (eds), *Media law and practice* (OUP 2009) 467.

¹⁸ Advisory Committee on the Framework Convention for National Minorities, 'The language rights of persons belonging to national minorities under the Framework Convention' ACFC/44DOC(2012) (5 July 2012)

http://www.coe.int/t/dghl/monitoring/minorities/3_fcnmdocs/PDF_CommentaryLanguage_en.pdf 16.

¹⁹ Tom Moring & Tarlach McGonagle, 'Analysis of Information provided by DH-MIN members on the Questionnaire on the access of national minorities to the new media in the information society: Overview of information provided by States and possible validity concerns' DH-MIN(2009)003 (9 March 2009) <http://www.ivir.nl/publicaties/download/731> 4.

²⁰ Joshua Fishman, *Reversing language shift: theoretical and empirical foundations of assistance to threatened languages* (Multilingual Matters 1991) 273, 374.

²¹ Eithne O'Connell, 'Towards a template for a linguistic policy for minority language broadcasters' in Elin Haf Gruffydd Jones and Enrique Uribe-Jongbloed (eds), *Social media and minority languages: convergence and the creative industries* (Multilingual Matters 2013) 188.

rights than was in the past possible, because the shift towards digital, participatory media undermines the earlier case that media is separated from personal life.

In particular, it is necessary to look beyond 'media law' in order to identify a more complete legal position in respect of new media. Language researchers increasingly recognise a need to consider language in a commercial context,²² while legal scholars of language call for greater attention to be paid to non-media components of legal instruments (e.g. article 13 ECRML on 'economic and social life').²³ In the field of Internet law, an interest in multiple modalities of regulation (e.g. Lessig's famous formulation of law, markets, social norms and architecture/design²⁴) supports an analysis of the relationship between language and new media with a broader set of questions. This latter point will be discussed in more detail in part 4, below.

2.3 The challenge of new technologies

As discussed above, existing approaches to minority language media may assume a particular 'model' of programme-making and broadcasting. However, what Caldwell termed a rhetorical shift from programme to content,²⁵ and Klinger pointed to as the destabilisation of the idea of the single audiovisual work or text,²⁶ is seen in various technological and market developments. Recent examples include the YouView project (access to catch-up TV from various sources through an Internet connection, on a TV screen), the growth of Netflix (and significant successes with first-run material e.g. *House of Cards*), and the BBC's decision to reposition its BBC3 service as on-demand only. The latest research from Ofcom suggests that rumours of the death of TV are overstated, with around 90% of TV screen viewing still being of linear broadcasts;²⁷ VOD users, whether on a TV or an Internet device, still focus on catch-up services for recently broadcast content.²⁸

There is however a relationship between age and the use of a range of devices to access Internet content, with the youngest groups in Ofcom's work the most likely to use smartphones and other new devices,²⁹ and to use other technologies (e.g. social networking) while watching TV.³⁰ These groups are also the lightest viewers of TV³¹

²² Helen Kelly-Holmes, 'Markets and languages: sociolinguistic perspectives' in Helen Kelly-Holmes & Gerlinde Mautner (eds), *Language and the market* (Palgrave Macmillan 2010) 21.

²³ Dunbar & Moring (n 13) 19-20.

²⁴ Lawrence Lessig, *Code version 2.0* (Basic Books 2006); Andrew Murray & Colin Scott, 'Controlling the new media: hybrid responses to new forms of power' (2002) 65 *Modern Law Review* 491-516.

²⁵ John Caldwell, 'Convergence television: aggregating form and repurposing content in the culture of conglomeration', in Lynn Spigel & Jan Olsson (eds), *Television after TV: Essays on a Medium in Transition* (Duke University Press 2004) 41-74, 49.

²⁶ Barbara Klinger, *Beyond the Multiplex* (University of California Press 2006) 72.

²⁷ Ofcom, *Communications Market Report 2014*

http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/2014_UK_CMR.pdf 154, 157

²⁸ *Ibid* 136

²⁹ *Ibid* 271; see also Ofcom, *Children and Parents: Media Use and Attitudes Report* (October 2014) http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-use-attitudes-14/Childrens_2014_Report.pdf 29.

³⁰ Ofcom (n 27) 46.

³¹ *Ibid* 181.

and their listening is dominated by online services and personal collections, as compared with the strong preference of older groups for broadcast radio.³² Audiovisual services (e.g. YouTube, BBC iPlayer) appear in the list of websites most accessed by all under-18 age groups.³³ Importantly, Ofcom's research proposes that in the 12-15 age group, more hours per week are spent on computers (using the Internet and playing video games) than consuming broadcast content (watching TV and listening to radio).³⁴ This means that a policy focused on radio and television will have an increasingly limited impact on younger audiences, including young minority language users.

The evolution of broadcasting is also of regulatory importance. For instance, the regulation of the independent production sector in the UK includes standard terms of trade (provided for in the Communications Act 2003) that limit the rights assigned to a commissioning broadcaster. The result is a rebalancing of interests between commissioner/broadcaster and independent producer when it comes to a range of new media-related works (apps, websites, video-on-demand, and the like). Furthermore, public service broadcasters may find it difficult to move into online services without triggering objections. EU law on competition and State aid can be a significant factor, although the 1997 Amsterdam Protocol does contain a broad protection for the funding of public service broadcasting.³⁵ In practice, this has been a significant issue for the BBC in areas such as educational content and local video. Thus, changes in the independent sector and in public service broadcasting challenge assumptions about incentives and funding – both of which have been key tools in minority language media policy for some time.

2.4 Minority language new media

While there is ongoing quantitative work on the adoption of new services by both adults and children,³⁶ there may be a need to consider, through greater attention to user experiences, some of the reasons why particular services are used or not used by linguistic minorities, and where minority languages are relevant as opposed to where majority languages (English in particular) are preferred. If specific measures are the way in which the goals of language rights are to be met, then the relevance of those measures is crucial.

There is a particular need to understand the online environment; although a web presence in a given language is a very 'visible form of nationalism' on the part of a particular culture,³⁷ much initial research on minority language and the Internet is

³² Ibid 215.

³³ Ofcom (*Children and Parents*) (n 29) annex 1.

³⁴ Ibid 56.

³⁵ Elda Brogi & Pier Luigi Parcu, 'The Evolving Regulation of the Media in Europe as an Instrument for Freedom and Pluralism', EUI Working Paper RSCAS 2014/09 5.

³⁶ See n 27-34 above and accompanying text.

³⁷ Nanette Gottlieb, 'Language on the Internet in Japan' in Gerard Goggin & Mark McLelland, *Internationalizing Internet Studies: Beyond Anglophone Paradigms* (Routledge 2009) 65-78, 67.

enthusiastic but limited.³⁸ Later work is more nuanced, pointing to the potential for lesser-used languages to benefit from technological change due to the lower entry costs and the ability to link up dispersed communities.³⁹

There is a known risk that as some audiences shift their time and attention from broadcasting (which has specific provision for language) to services like YouTube, the benefits of public funding for services such as S4C in Welsh may be diminished.⁴⁰ Changes in media use (in favour of on-demand services like Netflix) are indeed a challenge for agencies promoting minority-language audiovisual works. Some positive responses are possible, such as social media promotion and crowdsourced funding.⁴¹ Yet, this issue is not entirely a new one. For instance, White has recently brought together arguments on whether minority language programmes should appear on a dedicated channel or on a general-audience (primarily majority language) channel, with the neglected history of non-broadcast audiovisual production (in particular the circulation of tapes for showing in halls and at meetings in the Irish Gaeltacht).⁴²

However, work in media economics emphasises a need to be cautious in estimating the impact of a shift to on-demand. Doyle points to the ongoing salience of well-known brands and themes, warning that although there are great opportunities to go beyond the limited supply on over-the-air television, platform and access changes should not be assumed to lead to “greater diversity in audiovisual consumption patterns”.⁴³

Advocates for minority languages similarly recognize the need for action, examples being the contention that advocates of the Gaelic language must choose between using new technology to ‘help save’ the language and watching ‘from the sidelines as the new digital media world unfolds’,⁴⁴ Cunliffe’s distinction between the use of the Internet as an ‘instrument’ and ‘subject’ of resistance against globalization,⁴⁵ and even the suggestion that the launch of the website of Welsh-language broadcaster

³⁸ Brenda Danet & Susan Herring, ‘Multilingualism on the Internet’ in Marlis Hellinger and Anne Pauwels (eds), *Handbook of language and communication: diversity and change* (Mouton de Gruyter 2009) 571.

³⁹ Mairéad Nic Craith, ‘Rethinking language policies: challenges and opportunities’ in Colin Williams (ed), *Language and Governance* (University of Wales Press 2007) 178.

⁴⁰ Daniel Cunliffe & Rhodri ap Dyfrig, ‘The Welsh language on YouTube: initial observations’ in Elin Haf Gruffydd Jones and Enrique Uribe-Jongbloed (eds), *Social media and minority languages: convergence and the creative industries* (Multilingual Matters 2013) 143.

⁴¹ Miléna Santoro and others, ‘An interview with Carolle Brabant, Executive Director of Telefilm Canada’ (2013) 43 *American Review of Canadian Studies* 163-169, 166.

⁴² Jerry White, *The radio eye; cinema in the North Atlantic, 1958-1988* (Wilfred Laurier University Press 2009), especially at 186 and 217.

⁴³ Gillian Doyle, ‘Audio-visual Services: International Trade and Cultural Policy’ ADBI Working Paper Series No. 355 (2012) 13.

⁴⁴ Dòmhnall Caimbeul and Eilean Green, ‘Observations on bilingualism in digital media’ in John M. Kirk and Dónall P. Ó Baoill (eds), *Strategies for minority languages: Northern Ireland, the Republic of Ireland, and Scotland* (Cló Ollscoil na Banríona 2011) 180-186, 181.

⁴⁵ Daniel Cunliffe, ‘The Welsh language on the Internet: linguistic resistance in the age of the network society’ in Gerard Goggin & Mark McLelland, *Internationalizing Internet Studies: Beyond Anglophone Paradigms* (Routledge 2009) 96-111, 98.

S4C was comparable to the translation of the Bible into Welsh.⁴⁶ Yet in the absence of action, others argue that certain new technologies become “an enemy of national culture”, disseminating English-language, American-original works⁴⁷ in a way that is unlikely to be restrained by conventional regulation through quotas.

3. Application of the law

I have shown in part 2 that there is not a correlation between changes in media consumption and the fate of minority languages. Technological change should be seen as adding complexity, but more importantly, where regulatory interventions presuppose a particular type of engagement with media, there is a need to monitor the impact of existing provisions within and without the regulated spheres of activity. I now turn to a more detailed assessment of applicable legal provisions.

The focus of this section is the uncertainty (sometimes on the grounds of applying existing law, sometimes a debate of what ought to happen) regarding the role of the state in respect of on-demand and Internet content. Initially, European Union broadcasting law is considered. Subsequently, recent reports under the auspices of the ECRML are reviewed; finally, some general observations on the linear/on-demand divide in the context of minority language media are made.

3.1 EU media law

The instrument of most relevance to the present study is the Audiovisual Media Services Directive,⁴⁸ which applies to television and now also to TV-like on-demand services, but not to radio or audio, nor (in general) to user-generated content. EU requirements for European-produced programmes (“European Works”) have been extended (in a very diluted form) to on-demand services; a quota of at least half of broadcasting time applies for linear television services, while on-demand services are the subject of monitoring and a requirement that states ensure that services promote European works:

Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.⁴⁹

⁴⁶ David Barlow, Tom O'Malley and Philip Mitchell, *The media in wales: voices of a small nation* (University of Wales Press 2005) 153 (quoting Hugh Mackay).

⁴⁷ Harvey Feigenbaum, 'Is technology the enemy of culture?' (2004) 10 *International Journal of Cultural Policy* 251-263, 254.

⁴⁸ Directive 2010/13/EU of the European Parliament and of the council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L263/15.

⁴⁹ Directive 2010/13/EU, article 13(1).

I will discuss Article 13 under two headings: initially on its own terms (as an illustration of the challenge of ‘positive’ media regulation in relation to on-demand services), and then with specific reference to its use in relation to language.

The positioning of this requirement depends, unsurprisingly, on what it is compared with. Most on-demand services would, prior to the 2007 amendments, have been characterised as information society services, subject to very limited regulation under the Electronic Commerce Directive, 2000/31/EC. While this Directive contained certain obligations (for instance, identification of the service provider), content was at best a marginal concern – and, certainly, nothing resembling an obligation to promote European works. On the other hand, television services were and continue to be subject to a more thorough regulatory requirement - that (with certain exceptions and limited enforcement) a majority of broadcast time be given over to European works. So the result was a ‘new’ requirement for the on-demand sector, albeit one much less difficult to comply with than the existing television regime (which itself has been argued to be limited and misdirected).⁵⁰

The European Commission reported on the impact of article 13, as required by the Directive, in 2012.⁵¹ The key finding is a wide range of practices in implementing the very general requirement. In some states, on-demand services are required to ensure that a set proportion of their catalogues is comprised of European works (for example, 30% in Spain). Others chose to apply a turnover levy as a contribution to the production of European works. A particularly interesting approach is focusing on promotion and availability - a significant issue in the very crowded audiovisual space of the Internet, for example. Measures reported to the Commission ranged from the simple (identification of European works) to the more extensive (promotions and advertising).

The UK has taken the most minimalist approach possible. It did not adopt any new legislative text in respect of European works on on-demand services, meaning that the new co-regulatory body ATVOD has no specific powers in this regard. It does have a duty, under its agreement with Ofcom, to “to ensure that Service Providers promote, where practicable and by appropriate means, production of and access to European works” - that is, of course, the language of the Directive. In practice, ATVOD collects data under its general statutory powers in order to support the UK’s report to the European Commission. It publishes on its website an “encouragement” to promote European works (a single sentence using, again, the Directive’s language) and commits to writing to providers annually in pursuit of such encouragement.⁵²

⁵⁰ Tarlach McGonagle, ‘European-level measures for promoting cultural diversity in broadcasting: quixotic tilting in a new technological era?’ in *Mikä Osa Yleisöllä? Yearbook of Communication Law 2007* (KATTI 2008) 119-136, 121; Tarlach McGonagle, ‘The Quota Quandary: An Assessment of Articles 4-6 of the Television without Frontiers Directive’ in David Ward (ed), *The European Union and the Culture Industries: Regulation and the Public Interest* (Ashgate 2008)

⁵¹ COM(2012) 522, ‘Promotion of European works in EU scheduled and on-demand audiovisual media services’.

⁵² ATVOD, ‘European Works Plan 2012-15’ (November 2012)
http://www.atvod.co.uk/uploads/files/2012_European_Works_Plan_FINAL_2_061112.pdf

This is not inconsistent with the UK's initial scepticism on the regulation of on-demand services, but is the most limited available reading of the Directive. This is all the more remarkable as, in practice, ATVOD has made extensive use of its powers to address other issues,⁵³ especially sexually explicit content.⁵⁴

In terms of the actual availability of European works across the EU, there are two stories to be told. The optimistic one is very high figures for the proportion of catalogues that are European works - for instance, 96% on catch-up services, 99% on services from public service broadcasters). However, this surely reflects the fact that broadcasters (even PSBs) are often unlikely to have secured the rights to make imported programmes - especially films - available on on-demand services. The result is accidental compliance - and for new services (e.g. iTunes) which are unlikely to be restricted in this way, the proportion of European works is a less healthy figure, under 20%. The new provisions have also been criticised as creating regulatory burdens without having a positive impact on actual consumption of European works;⁵⁵ the tensions between supply and demand in quota policy⁵⁶ remain present. Furthermore, it has been argued whether, as a matter of principle and good lawmaking, "different quota regimes can be maintained in a context where linear and non-linear audiovisual services are converging".⁵⁷

Having discussed quotas under the Directive in general, it is also useful to note the specific position of language quotas. Some EU states have used the implementation of the AVMS Directive and its predecessors to set language requirements for on-demand services. This can be in general terms (a 'significant share' in the Flemish Community in Belgium to be in Dutch) or more specific, for a particular language (40% of all works in French in France) or set of languages (50% of the European works in an official language of Spain in Spain). These states are, however, in the minority⁵⁸ - as compared with a much wider range of language-related provisions for the 'linear' television obligations.⁵⁹ There are signs of convergence in this field - such as the role of the media regulatory bodies in France in the enforcement of French-language policy across a range of platforms.⁶⁰

⁵³ Irini Katsirea, 'Electronic press: 'Press-like' or 'television-like'?' (2015) 23 *International Journal of Law and Information Technology* 134-156.

⁵⁴ Julian Petley, 'The regulation of pornography on video-on-demand in the United Kingdom' (2014) 1 *Porn Studies* 276-300.

⁵⁵ Mira Burri, 'Cultural Protectionism 2.0: Updating Cultural Policy Tools for the Digital Age' in Sean Pager and Adam Candeub (eds), *Transnational culture in the Internet age* (Edward Elgar 2012) 9.

⁵⁶ Feigenbaum (n 47) 260.

⁵⁷ Evi Werkers & Peggy Valcke, 'The production and distribution of audiovisual works via new media in the light of European media policy: constraints and opportunities' (2012) 14 *Info* 68-86, 81.

⁵⁸ Attentional and others, 'Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services' (December 2011)

http://ec.europa.eu/archives/information_society/avpolicy/docs/library/studies/art_13/final_report_20111214.pdf 64.

⁵⁹ *Ibid* 45.

⁶⁰ Elizabeth Martin, 'Language policy and multilingual advertising in France' in Helen Kelly-Holmes & Gerlinde Mautner (eds), *Language and the market* (Palgrave Macmillan 2010) 86.

Regarding measures in respect of language, reference must also be made to the Recitals to the broadcasting Directives, and how these provisions have been used as an aid to interpretation by the Court of Justice of the European Union. The initial Television Without Frontiers Directive of 1989 clarified that states could apply stricter requirements to services under its jurisdiction, while recognising that they could not normally apply these rules to services under the jurisdiction of other EU states (the ‘country of origin’ principle). Language is specifically mentioned:

in order to allow for an active policy in favour of a specific language, Member States remain free to lay down more detailed or stricter rules in particular on the basis of language criteria, as long as these rules are in conformity with Community law, and in particular are not applicable to the retransmission of broadcasts originating in other Member States.⁶¹

This was reiterated in the Recitals to the first amending Directive of 1997 with slightly different wording.⁶²

The CJEU found in *UTECA*.⁶³, a challenge to the Spanish system of quotas, that although the objectives being pursued by Spain were different to those of the Directive, its system was not incompatible with the EU Treaties. It had been contemplated by the Directive (albeit not required by it), was in pursuit of a legitimate aim and was not disproportionate. Spain’s approach was to require broadcasters to spend 5% of revenue on certain works (European films), and 60% of that revenue to be in an official language of Spain, as well as the (required) 51% quota.

The Court relied upon the UNESCO Convention on Cultural Diversity in rejecting an argument that in order to qualify as an appropriate measure regarding culture, something more than language was required. The Convention provides that “linguistic diversity is a fundamental element of cultural diversity”, and mentions language requirements as the promotion of opportunities for “cultural activities, goods and services”⁶⁴ and, more generally, that States have a role in encouraging groups and individuals “to create, produce, disseminate, distribute and have access to their own cultural expressions”.

This was a significant finding for two reasons. Firstly, it confirms the scope for language-related legal measures to be held compatible with EU law. The alternative approach (presumably that a measure would need to have linguistic and a further characteristic such as a national dimension in order to be secure) would represent a retrogressive step in the protection of languages on their own terms. More broadly, the decision demonstrates the value of the Convention (which the EU has signed)

⁶¹ Recital 26; now recital 78 of the consolidated Directive.

⁶² Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, [1997] OJ L202/60, recital 44: “...member States remain free to apply to broadcasters under their jurisdiction more detailed or stricter rules in the fields coordinated by this Directive, including, inter alia, rules concerning the achievement of language policy goals”.

⁶³ [2009] 3 CMLR 2.

⁶⁴ Article 6(2)(d).

and the approach it takes to culture (even though it is not, really, a language instrument). The Advocate General discussed the Convention in the context of article 167 TFEU, the Charter of Fundamental Rights (article 22) and statements by EU institutions. It should be noted, however, that tensions were not fully explored on this occasion. Article 20 of the Convention, on its relationship with other instruments, has prompted ongoing debate in world trade law. However, the CJEU did not mention it – and the Advocate General did not reach any conclusions on this matter.

The outcome of the *UTECA* case, and earlier decisions, have been codified in the European Commission's most recent Cinema Communication.⁶⁵ This instrument sets out how schemes to promote cinema in member states will be reviewed for compliance with EU law. This typically arises through the requirement that state aid, which is permitted in limited circumstances, be reviewed by the Commission.⁶⁶ The Communication provides that Member States:

may require, as condition for the aid, inter alia, that the film is produced in a certain language, when it is established that this requirement is necessary and adequate to pursue a cultural objective in the audiovisual sector, which can also favour the freedom of expression of the different social, religious, philosophical or linguistic components which exist in a given region.⁶⁷

This may be a narrow reading of the decision, although the important finding that defending and promoting a language 'also serves the promotion of culture' is noted. Nonetheless, the inclusion of this paragraph in the Communication does confirm the legitimate role of language in the wider media policy field - especially as the original Communication of 2001 was entirely silent on the matter. At a time when the lines between broadcast regulation, the film industry, and cultural policy more generally are increasingly blurred, the recognition of the language between language and the widest notion of media is an important step towards a future-proofed minority language media policy.

3.2 ECRML

Turning now to the ECRML, we can initially note the emergence of article 7(1)(d) as being especially important for new media. This article, which applies generally rather than on the basis of State commitments, stipulates as an objective and principle of State action "the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life."

Examples can be found in the most recent reports by and about the United Kingdom. In the UK's own submission,⁶⁸ and the response of the Committee of Experts,⁶⁹ there are many examples of article 7(1)(d) and new media (with social media being emphasized by the latter). In relation to Cornish, various examples are cited across

⁶⁵ [2013] OJ C/332

⁶⁶ Article 107 TFEU.

⁶⁷ [2013] OJ C/332 [26].

⁶⁸ MIN-LANG (2013) PR 01. This, and all other national reports and Committee of Expert responses cited in this section, can be accessed at www.coe.int/minlang

⁶⁹ ECRML (2014) 1.

platforms: a BBC radio news bulletin, a DVD, and what is clearly a podcast despite not being labelled as such in the report (Radio an Gernewegva; <http://www.anradyo.com>). In respect of Manx, Manx Radio's programmes and online-only bulletins are cited along with the Manx Heritage Foundation's online work (including YouTube and Twitter). A similar diversity is noted in respect of Welsh - ranging from a Community Radio Fund to Golwg 360 (<http://www.golwg360.com>).

There are, of course, limits to what article 7(1)(d) can do. In an interesting exchange, the Committee of Experts encouraged the use of the Internet to promote Yenish (a nomadic minority language in Switzerland), but the Swiss authorities questioned whether the community sought such, while pointing to the possible use of Skype in support of education.⁷⁰ Separately, the Committee wondered about the value of a Finnish-language 'web radio channel' in Sweden which appeared to represent a great increase in broadcast time (from an hour or two per day to 15 hours per day), but was in practice 'mostly replays and music'.⁷¹

As noted above, Article 11 is the article more closely focused on the media, where the UK has made specific commitments. The most recent report includes discussion of the availability of TG4 (article 11(2)), BBC ALBA's website (interestingly, under 11(1e) on newspapers!), digital over-the-air broadcasting in Wales (article 11(1a)), and the Digital Development Fund in Wales (article 11(1d)). In respect of this Article, the Committee's report did deal with more difficult questions, including the reactions of NGOs (specifically, the funding of S4C in Wales) but the majority of the UK's article 11 commitments were not reconsidered as they had already been considered fulfilled in earlier reports, and the success of BBC ALBA was highlighted on more than one occasion.

Technological change is beginning to have an impact on the article 11 commitments of other signatory states. Examples include additional Web-only content (including 'video fragments') in various minority languages in Croatia,⁷² 'web TV' in Sami in Norway,⁷³ an online film service in Norway for Kven,⁷⁴ new Internet channels in the Basque language in Spain,⁷⁵ and broadcasters providing social media pages in support of minority language content, in Slovenia⁷⁶ and Sweden.⁷⁷

This does raise a question, on whether states could now consider making additional article 11 commitments, or to review their effectiveness in relation to media change and convergence. Because the reporting and monitoring system is closely connected to the Charter and to existing commitments and the last cycle of reports, states are not presently providing readily comparable information on the impact of digital technology. Valuable information and ideas in respect of social media and on-demand services emerges, but not in a methodical fashion.

⁷⁰ ECRML (2013) 4 [45].

⁷¹ ECRML (2015) 1, 297.

⁷² MIN-LANG (2014) PR 2, 66.

⁷³ MIN-LANG (2014) PR 7

⁷⁴ Ibid.

⁷⁵ MIN-LANG (2014) PR 5, 111.

⁷⁶ MIN-LANG (2013) PR 4, 63.

⁷⁷ ECRML (2015) 1, 299.

3.3 Domestic law

Because certain aspects of media law remain specific to a given state, consideration of the domestic legislative position of minority languages can also illustrate the issues under review. In the UK, there are some mentions of Gaelic and Welsh language media in legislation, although there is a focus on radio and television. These provisions are found in the Broadcasting Acts 1990 and 1996, and the Communications Act 2003. However, Irish language media is not specifically referred to – despite similar commitments being made under the ECRML in respect of this language.

These schemes are not without their wider problems. The bilingual National Assembly for Wales has no real functions in respect of Welsh-language broadcasting, and disputes have arisen between the Scottish and UK authorities regarding funding and governance for Gaelic-language broadcasting. The latter issue was addressed in part through section 17 of the Scotland Act 2012, where the Scottish Government was given new concurrent powers in respect of certain appointments.

Legislation also distinguishes between different forms of communication. For example, the Communications Act 2003 specifies in section 204 that the function of the Welsh Authority is “providing television programme services of high quality with a view to their being available for reception wholly or mainly by members of the public in Wales”, which must include the continuing provision of S4C. Online services are contemplated by, but not required by, section 205, subject to Ministerial approval. Broader language is found in respect of Gaelic (where a full television ‘channel’ was not available until long after S4C). The statutory function of Seirbheis nam Meadhanan Gàidhlig (MG ALBA) is to secure that “a wide and diverse range of high quality programmes in Gaelic are broadcast or otherwise transmitted so as to be available to persons in Scotland”.⁷⁸ Indeed, Cormack highlights how MG ALBA refers to a “digital service” rather than a “channel” in its publications.⁷⁹

The BBC Charter does not specifically refer to language (although it is surely covered by more than one of the section 4 ‘Public Purposes’, such as representing the ‘nations, regions and communities’ of the UK, or ‘stimulating creativity and cultural excellence’). It is framed in broad technological terms, though; output is to be supplied through “television, radio and online services” and “similar or related services which make output generally available and which may be in forms or by means of technologies which either have not previously been used by the BBC or which have yet to be developed” (section 5). The BBC Agreement (a more detailed instrument) specifically refers to Radio nan Gaidheal and Radio Cymru (and the multilingual Asian Network), and after amendment, BBC ALBA and S4C, and glosses the public purpose of representation by requiring the BBC Trust to have regard to “the importance of appropriate provision in minority languages”.

⁷⁸ Communications Act 2003, s 208.

⁷⁹ Mike Cormack, ‘Gaelic in the New Digital Landscape’ in Gillian Munro & Iain Mac an Tàiller (eds), *Coimhearsnachdan Gàidhlig an-diugh/Gaelic communities today* (Dunedin Academic Press 2010) 127-137, 134.

This brief survey demonstrates that various commitments are made to supporting minority languages within the UK system of media law. Although these commitments may be criticised as being lacking in detail, or in treating like matters inconsistently, they can be praised for putting minority language media policy in an holistic context, and recognising that future audiences will access content through a range of platforms.

3.4 The current position

Indeed, broadcasters and producers working in minority languages, including those with ECRML status in the UK, are increasingly providing or supplying on-demand services. Broadcasters recognise the importance of the online availability of content, and there are plenty of examples in the UK of “brand extension” of public service brands (such as new channels like ITV2 or the BBC’s extensive online offerings).⁸⁰ Online services are pointed to as a way of overcoming the territorial limitations of broadcast licensing, where legal territory may not correspond with linguistic borders⁸¹. Others in the creative industries, who have normally fallen outside the remit of broadcast regulation, are also active, as the ECRML material (discussed above) demonstrates. This means that, even in the absence of direct stipulations or requirements, minority languages will form a part of the on-demand media environment.

Public policy intervention can also be found through indirect means. A good example here is the Welsh Language Strategy 2012-17 (itself required by s 78 of the Government of Wales Act 2006) - where one of the six goals is “to strengthen the infrastructure for the language, including digital technology”. This would not conventionally be considered as media policy, but the combination of non-media measures of this nature with the extension of conventional media measures into new domains can be seen as promising.

However, there is a special challenge to legal approaches. As Arraiza has argued, in a related context, minority language sits in a grey zone between rights and privacy.⁸² That is to say, different facets of language use are more or less appropriate for regulation in a way that is consistent with democratic standards and the human rights obligations of states. (Consider the difference between requiring the use of a language on a public service broadcaster, and requiring it of individual Facebook pages; this goes to the heart of the competing objectives of language policy). Or to put it more bluntly, will regulation be at odds with emerging consumer practices? When VOD services promote choice and control, will viewers react badly when regulation is “weighed against their entertainment whim of the moment”?⁸³ A

⁸⁰ Catherine Johnson, *Branding Television* (Routledge 2012) 48, 74, 129.

⁸¹ Josep Lluís Micó & Pere Masip, ‘The fight of a minority language against the force of globalization: the case of Catalan on the Internet’ in Gerard Goggin & Mark McLelland, *Internationalizing Internet Studies: Beyond Anglophone Paradigms* (Routledge 2009) 112-127, 117.

⁸² José-María Arraiza, ‘Blueprints for Babel: Legal Policy Options for Minority and Indigenous Languages’ (2011) 17 *European Public Law* 111-138, 177.

⁸³ Feigenbaum (n 47) 255.

possible solution, as considered in the next part, is thinking more seriously about infrastructure.

4. A way forward

A target of language policy can be functional completeness, or the ability to live life in and through the language. It has been argued, for example, that the interpretation of the Canadian constitutional provisions on language has, in respect of French speakers outside Quebec, achieved some aspects of functional completeness and the related concept of group rights.⁸⁴ This is based on the work of the Supreme Court of Canada, e.g. *Arsenault-Cameron v PEI*⁸⁵ on education as a part of concepts of community. Moring has drawn attention to the presence of suitable media platforms and official commitments as an aspect of institutional completeness, though warning that institutional completeness may not lead to functional completeness.⁸⁶

The evidence presented in part 3 is that the institutional dimension is indeed being undermined through the development of digital media. However, I have also shown how, even if this is the case, digital media does not displace the policy imperative – instead, it remains important as an aspect of functional completeness, but in a different domain. A better framework for analysis is therefore one that takes a broad approach to media institutions and to regulation. This is supported both by the ‘governance constellations’ theory formulated by Katzenbach⁸⁷ (proposing a constructivist approach to how technologies are used), and Murray’s ‘symbiotic regulation’ analysis⁸⁸ (that users are dynamic rather than static, and successful regulation will understand this).

Specifically, Internet intermediaries may be understood as an emerging type of media institution; a search engine or social networking site already has a significant impact on the discoverability and prominence of content. Regulation can take place through system defaults and technological affordances (e.g. whether the use of a language is possible, or how visible it is within a service), alongside the more obvious subjects of national broadcasting law and licensed service providers.

My own earlier work has highlighted the role of law in the construction of physical and virtual spaces.⁸⁹ I argued that scholarship on public space and on digital media

⁸⁴ Stéphanie Chouinard, ‘The Rise of Non-territorial Autonomy in Canada: Towards a Doctrine of Institutional Completeness in the Domain of Minority Language Rights’ (2014) 13 *Ethnopolitics* 141-158, 142-4.

⁸⁵ [2000] 1 SCR 3.

⁸⁶ Tom Moring, ‘Functional completeness in minority language media’ in Mike Cormack & Niamh Hourigan (eds), *Minority language media: concepts, critiques and case studies* (Multilingual Matters 2007) 18.

⁸⁷ Christian Katzenbach, ‘Media governance and technology: from “code is law” to governance constellations’ in Monroe Price and others (eds), *Routledge handbook of media law* (Routledge 2013) 405-411.

⁸⁸ Andrew Murray, *The regulation of cyberspace: control in the online environment* (Routledge 2007).

⁸⁹ Daithí Mac Síthigh, ‘Virtual walls: the law of pseudo-public spaces’ (2012) 8 *International Journal of Law in Context* 394-412.

(social networking in particular) is closely connected, and that a critical legal approach can bridge this gap, through focusing on power, legitimacy, and control. I contend that focusing on the legal ownership of a square or mall glosses over the cultural and communicative significance of a given space, and that a similar problem has arisen with regard to key Web services. This can be applied to the present case of language, because of what has been called a spatial turn in sociolinguistics – in particular, growing interest in the ‘linguistic landscape’. It is particularly relevant how this work is framed by Gorter,⁹⁰ in an introduction to an edited collection on linguistic landscapes, as new attention to public space in response to the conventional focus on media. The potential of the approach I am proposing can be demonstrated by reference to a number of examples.

Software, hardware and technologies in general can be thought of as the material culture of a language,⁹¹ but early design choices (often for reasons of limited capacity or resources) can privilege English and some other languages over others. Technological change can simultaneously highlight opportunities (e.g. automated translation, digital transmission, lower entry barriers) and threats (standardised hardware and software, incompatible systems, lack of user awareness). It will often be the technological intermediary, or standard-setting bodies (often informal and/or non-governmental), who will make influential decisions in this regard. Yet, these bodies may not be engaged with discourses of minority language protection, or considered by (to take a particularly important example) national reports and expert reviews under the ECRML.

Indeed, the abiding contribution of ‘cyberlaw’ to wider debates on regulation is the importance of understanding the way in which hardware and software perform regulatory functions - whether mandated by legal authorities or not. This is, naturally, a relevant consideration in relation to language. Services at the margins of media law, like YouTube, provide access to a huge, diverse body of material in hundreds of languages. However, there is no categorisation or consistent tagging by language,⁹² making search and discovery a difficult process. This is far removed from the conventional broadcast model of scheduling, programme guides and limited choice – meaning that although there is no technological limit to the number of videos that can be disseminated in a language, actual access is hard to guarantee – and as discussed above, the conventional tools for promoting multilingual content may not fit this format.

Social practices also shift rapidly; recent work on the use of Twitter has pointed to the diversity of approaches taken by and social codes recognised by minority-

⁹⁰ Durk Gorter and others, ‘Studying minority languages in the linguistic landscape’ in Durk Gorter and others (eds), *Minority languages in the linguistic landscape* (Palgrave Macmillan 2012) 1.

⁹¹ Larissa Aronin & Muiris Ó Laoire, ‘The material culture of multilingualism’ in Durk Gorter and others (eds), *Minority languages in the linguistic landscape* (Palgrave Macmillan 2012) 308.

⁹² Cunliffe & ap Dyfrig (n 40) 131, 133.

language users⁹³ (e.g. flagging changes in language, distinguishing between quotation and translation).

A final example is a recent debate on the relationship between the broadcaster and the public sphere, and how that differs between minority-language broadcasting in different territorial contexts.⁹⁴ A distinction is made between broadcasting as part of the construction of a territorial political community and broadcasting in support of a language. In view of the analysis presented here, one could add that technological change is surely a part of this, in the way that it disrupts concepts of territory and, in some regards, national sovereignty. Given the importance of nation states in respect of minority language rights, one must not go too far, except to acknowledge that challenge to territory associated with digital media more generally cannot leave minority-language territorial community formation untouched.

5. Conclusion

Positive obligations, non-market measures and other forms of distinctive treatment in respect of minority language media are not without controversy to begin with. For advocates, a certain degree of frustration with rapidly changing distribution and consumption patterns would be understandable. In this article, I have highlighted some of the challenges that shifts to digital, on-demand and participatory media pose to initiatives that were often constructed in areas of political sensitivity and compromise. These challenges include the possible reduction in relevance of broadcast-time quotas, changing habits on the part of the crucial generation of younger speakers, and the applicability of international standards drafted with a particular set of technologies in mind.

The picture, though, is not entirely a bleak one. The values underpinning earlier interventions, including rights to receive and impart information and obligations on states to facilitate minority languages, are supplemented by new commitments, such as cultural diversity. Speakers of minority languages seize the opportunities of using new technologies to promote and sustain linguistic communities, as the wide-ranging reports on the implementation of the ECRML verify.

Drawing upon both the encouraging and the discouraging, I have identified a link between sociolinguistic concerns and the cyberlaw interest in infrastructure, virtual space and regulation. I contend that using these approaches to build on the well-understood values supporting minority language, media policy can make language rights easier to understand and achieve, while digital media continues to develop and surprise.

⁹³ Ian Johnson, 'Audience design and communication accommodation theory: use of Twitter by Welsh-English biliterates' in Elin Haf Gruffydd Jones and Enrique Uribe-Jongbloed (eds), *Social media and minority languages: convergence and the creative industries* (Multilingual Matters 2013) 114.

⁹⁴ Josu Amezaga and others, 'The Public Sphere and Normalization of Minority Languages: An Analysis of Basque Television in Light of Other Experiences in Europe' (2013) 32 *Trípodos* 93-111